Office of Chief Counsel
Internal Revenue Service

memorandum

CC: [redacted]:TL-N-1847-00
[redacted]

date: JUL 24 2000

to: [redacted] Appeals Office
Attn: Associate Chief, Group 1

from: District Counsel, [redacted] District

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subject: [redacted] **Proposal for Closing Agreements with Respect to Claims for Abatement of Interest**

This is in response to your memorandum dated March 17, 2000, requesting our advice with respect to closing agreement language that would bind the cases of approximately [redacted] investors to a lead Tax Court case with respect to the issue of interest abatement. The potential claims are for taxable years beginning prior to [redacted]. You provided copies of four documents to this office, as an explanation of the [redacted] investors' potential claims with respect to the merits of the interest abatement issue. Copies of those documents are attached to this memorandum.

After considering various language that could be incorporated into such closing agreements, and bearing in mind the running of the statute of limitations on collection, we conclude that it is not in the government's interest to enter into such closing agreements.

BACKGROUND

For tax years beginning on or before July 30, 1996, I.R.C. § 6404(e) provided in relevant part:

> (1) In general.--In the case of any assessment of interest on --
>
> > (A) any deficiency attributable in whole or in part to any error or delay by an officer or employee of the Internal Revenue Service (acting in his official capacity) in performing a ministerial act, * * *
>
> * * * * * * *

> the Secretary may abate the assessment of all or any part of such interest for any period. For purposes of the preceding sentence, an error or delay shall be taken into account only if no significant aspect of such error or delay can be attributed to the taxpayer involved, and after the Internal Revenue Service has contacted the taxpayer in writing with respect to such deficiency * * *.[1]

Section 6404(i)(1) of the Code provides further that the Tax Court shall have jurisdiction over any action brought by a taxpayer to determine whether the Secretary's failure to abate interest was an abuse of discretion, and may order an abatement if such action is brought within 180 days after the date of the mailing of the Secretary's final determination not to abate such interest.[2] In order to prevail, the taxpayer must demonstrate that in not abating interest the Secretary exercised his discretion arbitrarily, capriciously, or without sound basis in fact or law. See Woodral v. Commissioner, 112 T.C. 19, 23 (1999).

Section 6404(e) does not define what is meant by the term "ministerial act". The first Tax Court case dealing with that question was Lee v. Commissioner, 113 T.C. 145 (1999), which looked for guidance to the legislative history behind the enactment of § 6404(e). It quoted from the House Ways and Means Committee report (House report) and the Senate Finance Committee report (Senate report) as follows:

> the term "ministerial act" [should] be limited to nondiscretionary acts where all of the preliminary prerequisites, such as conferencing and review by supervisors, have taken place. Thus, a ministerial act is a procedural action, not a decision in a substantive area of tax law. * * * [H. Rept. 99-426, supra at 845, 1986-3 C.B. (Vol. 2) at 845; S. Rept. 99-313, supra at 209, 1986-3 C.B. (Vol. 3) at 209.]

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[1]Congress amended § 6404(e) in 1996 to permit abatement of interest for "unreasonable" error or delay in performing a "ministerial or managerial" act. Taxpayer Bill of Rights 2 (TBOR 2), Pub. L. 104-168, § 301(a)(1) and (2), 110 Stat. 1452, 1457 (1996). That standard, however, applies to tax years beginning after July 30, 1996. TBOR 2, § 301(c), 110 Stat. 1457. See Woodral v. Commissioner, 112 T.C. 19, 25 n.8 (1999).

[2]I.R.C. § 6404(g) was redesignated as § 6404(i) by the Internal Revenue Service Restructuring & Reform Act of 1998 (RRA 1998), Pub. L. 105-206, §§ 3305(a), 3309(a), 112 Stat. 685, 743, 745.

The Tax Court in the Lee case also noted that the House and Senate reports provide as an example that an unreasonable delay in the issuance of a statutory notice of deficiency after the IRS and the taxpayer have completed efforts to resolve the matter would be grounds for abatement of interest.

The Temporary regulations issued by the Secretary provide a definition of "ministerial act" and provide numerous examples of what is or is not an error or delay in performing a ministerial act. Temp. Treas. Reg. 301.6404-2T(b)(1) states:

> The term "ministerial act" means a procedural or mechanical act that does not involve the exercise of judgment or discretion, and that occurs during the processing of a taxpayer's case after all prerequisites to the act, such as conferences and review by supervisors, have taken place. A decision concerning the proper application of federal tax law (or other federal or state law) is not a ministerial act.

CLOSING AGREEMENT LANGUAGE

Counsel for the [redacted] investors have requested that the Service (1) issue just one determination letter with respect to an interest abatement claim, to an investor who will become the petitioner in a lead case before the Tax Court; and (2) enter into closing agreements with the other [redacted] investors. The closing agreements will bind both parties to the outcome of the lead case, so that the [redacted] investors will be relieved from paying their own $60 filing fees to the Tax Court.

You have requested our assistance in drafting the language for such closing agreements. Your memorandum requesting our advice set forth the following conditions that you deem necessary for such closing agreements:

1. The closing agreements will not specify a [redacted] partnership.

2. The closing agreements will not specify specific taxable years. (After discussing this item with our office, you have withdrawn this as a requirement.)

3. The closing agreements will be limited to the issue of whether the failure of the Service to remove [redacted] as the Tax Matters Partner is a ministerial act.

4. The closing agreement will include a waiver by the investor of the right to receive a determination letter.

We find your third requirement to be insurmountable. A review of the voluminous correspondence attached to this memorandum is a clear indication that counsel for the [redacted] investors has no intention of limiting the arguments in the lead case to the single issue of whether the failure of the Service to remove [redacted] as the Tax Matters Partner is a ministerial act. To the contrary, it indicates that they will continue to advance new arguments. The closing agreements will not bind the [redacted] investor who is the petitioner in the lead case, and the Service will have no control over the arguments that such investor can raise in the lead case. Therefore, any limitation on the arguments can only be made with the other investors in the closing agreements themselves.

If the closing agreements were to state that the parties are bound only if the decision in the lead case is based solely upon the issue of whether the failure of the Service to remove [redacted] as the Tax Matters Partner is a ministerial act, then the closing agreements will not be binding if the decision in the lead case is based upon any other issue, or upon a combination of issues. Given the wide range of arguments that counsel for the [redacted] investors sets forth in the attached correspondence, there is a substantial likelihood that the decision in the lead case will not be based solely upon the issue of whether the failure of the Service to remove [redacted] as the Tax Matters Partner is a ministerial act. Should that be the case, the result will be the same as if no closing agreements had been executed. (It should be noted that, even if the government believes that the decision in the lead case is based solely upon the issue of whether the failure of the Service to remove [redacted] as the Tax Matters Partner is a ministerial act, the other [redacted] investors will likely argue otherwise, and the government would then have to litigate the issue of how to interpret the Court's opinion in the lead case. This process would be costly and time-consuming.)

We note that, while we find your third requirement insurmountable, we also find it necessary. To bind the remaining [redacted] investors to the lead case without specifying the issue would present the possibility of interest having to be abated for all the investors even if in the lead case interest was abated for some reason unique to that investor.

THE STATUTE OF LIMITATIONS ON COLLECTION

The period of limitations on collection is ten years from the date of assessment of the tax. I.R.C. § 6502(a). In the absence of an installment agreement or a levy, the limitations period may not be extended. Should the Service enter into closing agreements with [redacted] investors to bind the parties to the outcome of a lead case, the statute of limitations on collection of the interest owed by the [redacted] investors could expire before the lead case is finally decided.

CONCLUSION

For the foregoing reasons, we believe that it is not in the government's interest to enter into the proposed closing agreements. However, you may consider two other alternatives that might reduce, in part, litigation costs to the taxpayers. First, if the taxpayers' counsel agreed, you could issue a determination letter to [redacted], and hold the other claims in abeyance in the Appeals Division awaiting the outcome of the litigation that would result from the appeal of your disallowance of [redacted]'s claim. If that course of action is not acceptable to you or the taxpayers' counsel, you might inform the taxpayers' representative that they could propose piggybacking the various cases after they have been petitioned with the Tax Court. Under this scenario, the petitioners would not save on filing fees payable to the Tax Court. However, they could reduce their litigation costs significantly by agreeing to pick a few test cases, and piggybacking the remainder. This latter course of action would require you to issue determination letters to each of the taxpayer-claimants.

If you have any questions or would like to discuss this matter further, please do not hesitate to call.

By: [redacted]
Attorney

Approved:

[redacted]
Assistant District Counsel

cc: Regional Counsel, Western Region (TL)
Assistant Chief Counsel, Field Service

Attachments:
Copy of letter dated July 22, 1998 from [redacted] to the Atlanta Service Center
Copies of three letters, dated August 27, 1998, October 19, 1998, and December 8, 1999, from [redacted] to your office